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PP

v.

AHMAD KHAIRUL FA'AIS MAT DAHLAN & ORS

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HIGH COURT MALAYA, IPOH
VT SINGHAM J
[CRIMINAL TRIAL NO: 45-07-2005]
24 MARCH 2006

C ***CRIMINAL PROCEDURE:*** *Sentence - Appeal against - Mitigating factors - Plea of guilty - Consideration of - Whether maximum term of sentence should be imposed - Whether offence demands for severe deterrent sentence - Public interest - Whether taken into account - Whether sentence of 14 years' imprisonment appropriate - Penal Code, s. 304(a)*

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The first and second accused persons herein were charged under s. 323 Penal Code (amended charges) while the third accused person was charged under s. 304(a) Penal Code (alternative charge). The first and second accused persons understood the charge against them and pleaded guilty. The third accused also pleaded guilty to the alternative charge and maintained his plea of guilty after the nature and consequences of his plea was explained to him in Bahasa Malaysia. Upon accepting the plea of guilty, all the accuseds were found guilty and convicted as per the amended charge against the first and second accuseds and as per the alternative charge against the third accused. Counsels then submitted their plea of mitigation with the authorities on sentence. This appeal was against sentence by the third accused ('hereinafter referred to as the 'accused') and the mitigation plea submitted on his behalf was as follows (a) that the deceased had cut across in front of the accused and made a U-turn and that the deceased had got out from his car and challenged the accused and a stone was thrown which hit the accused on his face; (b) the accused realised that there was blood on his face as a result of the stone which was thrown by the deceased and the accused then picked a brick and hit the deceased; (c) the accused regretted his action because he was unable to control his temper and did not realise at that time the consequences of his action (d) the accused had surrendered himself to the police; (e) the incident was not planned against the deceased as the deceased was not known to the accused; (f) the accused did not use any violence as compared to

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the violence used in offences under s. 304(a) of the Penal Code. It was urged upon this court to give a lenient sentence to the accused.

On the other hand, the Deputy Public Prosecutor submitted that (a) the degree of culpability against the accused where he caused the death of the deceased must be considered; (b) the accused had left the scene of the incident but had returned towards the deceased and caused injuries; (c) there were no reasonable grounds to impose a lenient sentence (d) the court has to consider the deterrence and public interest;(e) justice system should not tolerate such wanton disregard and breach of law and foremost human life and the court must show its abhorrence. It was urged upon this court by the Deputy Public Prosecutor to impose the maximum sentence of twenty years. Having considered the facts of the case as presented by the prosecution against the accused, the plea of guilty and the submissions of counsels and the Deputy Public Prosecutor, the accused was sentenced on 16 December 2005 to 14 years' imprisonment from the date of his arrest on 31 March 2005. Hence, this appeal by the accused.

Held:

(1) The offence committed by the accused was serious and the degree of seriousness must be reflected on the sentence imposed but at the same time, the court must also have regard to the proportion between the offence, the punishment provided by law, the mitigating plea, and any extenuating circumstances which might exist and to be in favour of the accused. The maximum term of sentence as urged upon the Deputy Public Prosecutor must be limited by referring to the circumstances of the offence itself. This court did not agree that the maximum sentence should be imposed against the accused on the facts and circumstances in the instant case. (para 33)

(2) The age factor that the accused is young is taken as a decisive consideration in the assessment of sentence may perhaps have to give way to safeguard public interest and safety of life and property. It is of course for the good to repent but it is too late after the fatal incident as the grief and suffering by the deceased's family cannot be described in language than to imagine that it must be a very painful and

unbearable feeling and experience as the life has been taken away by unlawful means by the accused for which the accused must be prepared to accept the punishment provided by law subject to the consideration of the facts and mitigating circumstances. (para 34)

(3) The anger of the accused should have subsided when the accused left the scene but instead he returned to the scene as probably he could no longer control his temper and moved forward towards the deceased and inflicted the fatal injury by hitting the deceased with a brick stone as admitted by him. It is the essence of provocation that the acts of others or the victims cause offenders to lose their self control and retaliate and commit offence but it is necessary to balance the degree and nature of the provocation against the acts of violence committed by the accused. The accused herein had the opportunity for a cooling period when he left the scene but he returned and caused the fatal injury to the deceased. Nevertheless, this court considered the mitigation plea on behalf of the accused and that it should not be brushed aside and also the fact of co-operation and assistance given to the police to wrap up or complete the investigation so soon and eventually the plea of guilty. However, the manner and circumstances in which the accused had committed the offence on the deceased and on a public road was grave where motorists expect to drive safely not only of road accidents but free of crime. Street brawls is the very type of offence which demands for severe deterrent sentence. (para 35 & 36)

(4) Loss of human lives could not be compensated by the length of imprisonment and any punishment imposed against the accused could not comfort the family of the deceased nor would it cure their anguish. On the other hand, there was no warrant for the court to take into account the wishes of the victim or victim's family to determine the appropriate sentence and if that was allowed it would tantamount to acceding the wishes of the gallery and that has to be disregarded. Nevertheless, some objective assessment of the effect upon the victim or victim's family may be taken into account without paying heed to the wishes of the victim or the victim's family that a punishment of the utmost severity be imposed. It was entirely appropriate for this court to take into consideration the impact of crime on the family of the deceased, and to give public recognition of the grief and suffering imposed. (para 41)

(5) The requirement of mercy and leniency to be shown to an individual offender depends on multiplicity of facts, facts of the case, circumstances, the mitigating plea, the offender's favourable subjective circumstances which triggered the retaliation, degree and nature of provocation and any extenuating circumstances under which the offence was committed and all these factors must be balanced with public interest which was paramount. (para 42)

(6) Acts of violence by offenders on a slightest provocation to the extent which has resulted in death would not be tolerated in our society and such criminal acts of violence would result in appropriately severe sentence to deter attacks in public streets. The function of the criminal law and purpose of punishment could not be found in any single explanation, for it depends both upon the nature and type of offence and the offender but all purposes may be reduced under the single heading of the protection of society, the protection of the community from the crime. However, a plea of guilty was always a matter for the court to take into account when imposing sentence and significant reference should explicitly be made to that consideration in the sentencing process. As such, the sentence of 14 years' imprisonment was most appropriate on the facts and circumstances in the instant case. Accordingly, the accused was sentenced to 14 years' imprisonment from the date of arrest on 31 March 2005. (para 47)

[Order accordingly.]

Case(s) referred to:

Ahmad Hj Bakar v. PP [1988] 2 MLJ 216 ***(refd)***
Bollen (Mark Andrew) [1998] 99 A Crim R 510 ***(refd)***
Chandra Sekaran Ramiyah & Anor v. PP [2000] 3 CLJ 293 CA ***(refd)***
Christopher Khoo Ewe Cheng v. PP [1998] 3 CLJ 705 CA ***(refd)***
Fan Yew Teng v. PP [1975] 2 MLJ 235 ***(refd)***
Gilson v. The Queen [1991] 172 CLR 353 ***(refd)***
Hashim Saud v. Yahaya Hashim & Anor [1977] 2 MLJ 116 ***(refd)***
Koay Teng Soon & Anor v. PP [2000] 1 CLJ 677 CA ***(refd)***
Liow Siow Long v. PP [1970] 1 MLJ 40 ***(refd)***
MA (Thanh) [1999] 107 A Crim R 252 ***(refd)***
Mat Omar v. PP [1997] 1 LNS 528 ***(refd)***
Melvani v. PP [1971] 1 MLJ 137 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1988] 1 MLJ 167 ***(refd)***
Mohamed Noor v. PP [1966] 2 MLJ 173 ***(refd)***
Ong Hwee Leong v. PP [1992] 1 SLR 794 ***(refd)***
PP v. Doraigunaraju Krishnan [1993] 3 CLJ 664 HC ***(refd)***

PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Gopalan [1985] 2 MLJ 230 ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Muhari Mohd Jani & Anor [1999] 8 CLJ 430 HC ***(refd)***
PP v. Mustapha Abdullah [1996] 3 CLJ 458 HC ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
PP v. Safian Abdullah & Anor [1983] 1 CLJ 324; [1983] CLJ (Rep) 804 HC ***(refd)***
PP v. Saiful Afikin Mohd Firus [1996] 3 CLJ 629 HC ***(refd)***
PP v. Soo Tai Leng [2005] 7 CLJ 218 HC ***(refd)***
PP v. Tai You Choy [1982] CLJ 78; [1982] CLJ (Rep) 687 HC ***(refd)***
PP v. Tay Chuan Beng & Anor [1989] 1 MLJ 403 ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
PP v. Tengku Mahmood Iskandar & Anor [1973] 1 MLJ 128 ***(refd)***
PP v. Yap Chong Fatt [1963] 29 MLJ 136 ***(refd)***
PP v. Zalamud Mohd Ali & Ors [2003] 6 MLJ 241 ***(refd)***
R v. Cuthbert [1967] 86 WN (Pt 1) (NSW) 272 ***(refd)***
R v. Henry [1999] 46 NSWLR 346 ***(refd)***
R v. Mansour [1999] 29 MVR 409 ***(refd)***
R v. Shepard, R v. Vernet [1994] 2 All ER 242 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Ralon Banas v. PP [2000] 3 CLJ 310 CA ***(refd)***
Rosli Supardi v. PP [2002] 3 CLJ 544 CA ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Tan Bok Yeng v. PP [1972] 1 MLJ 214 ***(refd)***
Valentinzi [1980] 2 A Crim R 170 ***(refd)***
Veen v. The Queen (No 2) [1988] 164 CLR 465 ***(refd)***
Veerian T Latchmanen v. PP [2001] 7 CLJ 466 ***(refd)***
Vinaga Moorthy Gopal v. PP [2003] 1 CLJ 758 CA ***(refd)***
Yit Kean Hong v. PP [2005] 4 CLJ 592 CA ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Penal Code, ss. 34, 302, 304(a), 323

For the 3rd accused - T Ellanggovan; M/s Kula & Assoc
For the prosecution - Muhamad Anas Mahadzir DPP

Reported by Suhainah Wahiduddin

JUDGMENT

VT Singham J:

[1] On 29 June 2005, three accused persons namely, Ahmad Khairul Fa'ais bin Mat Dahlan aged 20 years, Mohd. Zaidi bin Jamli aged 23 years and Nazhazizud-Din bin Md. Nawi 22 years were charged as follows:

Bahawa kamu bersama-sama pada 12 Mac 2005 jam lebih kurang di antara 4.15 pagi hingga 4.30 pagi di tepi jalanraya Jelapang-Chemor berhadapan kilang Felcra Hose & Hose, Jelapang, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah melakukan pembunuhan dengan menyebabkan kematian AZMAN BIN ABDUL KARIM, KPT No. 680330-08-5759 dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

[2] All three accuseds pleaded not guilty and the case was fixed for mention on 25 July 2005 for the court to assign counsels for the accuseds as they informed the court that they could not afford to engage a lawyer to represent them. The case was not called up until 6 September 2005 as there was an application from one of the counsels for an adjournment.

[3] On 6 September 2005, the case was called up for mention. The charge was read and explained separately to all the three accuseds in Bahasa Malaysia and they maintained their original plea of not guilty. However, at the request of counsels for the three accuseds who were assigned by the court, the case was fixed for further mention to enable counsels to write to the Honourable Attorney-General to review the charge with a view to grant a reduction or amendment.

[4] On 27 October 2005, when the case was called up again for mention, the learned Deputy Public Prosecutor informed the court that he has received direction from the Honourable Attorney-General to tender an amended charge which has been reduced to an offence under s. 304(a) of the Penal Code on condition all three accuseds are agreeable to plead guilty to the amended charge. At the request of counsels for the accuseds to obtain further instructions from their clients, a further mention date was fixed.

[5] On 8 December 2005, the learned Deputy Public Prosecutor tendered an amended charge separately against the first and second accuseds which is as follows:

Bahawa kamu bersama-sama pada 12 Mac 2005, di antara jam 4.15 pagi hingga 4.30 pagi di tepi jalanraya Jelapang-Chemor berhadapan kilang Felcra Hose & Hose, Jelapang, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah dengan sengaja menyebabkan kecederaan keatas AZMAN BIN ABDUL KARIM K/P No. 680330-08-5759, oleh yang demikian kamu telah

melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 323 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

[6] As for the third accused, a separate charge was tendered with an alternative charge which is as follows:

Amended Charge

Bahawa kamu pada 12 Mac 2005, di antara jam 4.15 pagi hingga 4.30 pagi di tepi jalanraya Jelapang-Chemor berhadapan kilang Felcra Hose & Hose, Jelapang, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah melakukan pembunuhan dengan menyebabkan kematian AZMAN BIN ABDUL KARIM K/P No. 680330-08-5759, oleh yang demikian kamu telah melakukan suatu kesalahan dibawah seksyen 302 Kanun Keseksaan dan boleh dihukum dibawah peruntukan yang sama.

Alternative Charge

Bahawa kamu pada 12 Mac 2005, di antara jam 4.15 pagi hingga 4.30 pagi di tepi jalanraya Jelapang-Chemor berhadapan kilang Felcra Hose & Hose, Jelapang, Ipoh di dalam Daerah Kinta di dalam Negeri Perak, telah melakukan homisid salah tak terjumlah membunuh melalui perbuatan yang dilakukan apabila dengan niat menyebabkan bencana tubuh yang mungkin menyebabkan kematian AZMAN BIN ABDUL KARIM K/P No. 680330-08-5759, oleh yang demikian kamu telah melakukan suatu kesalahan dibawah seksyen 304(a) Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[7] The amended charge against the first and second accuseds was read and explained separately to them in Bahasa Malaysia and both the accuseds understood the charge and pleaded guilty after they understood the nature and consequences of their pleas which was explained to them. As for the third accused both the amended charge and the alternative charge was read and explained in Bahasa Malaysia. He pleaded not guilty to the amended charge. Nevertheless, he pleaded guilty to the alternative charge and maintained his plea of guilty after the nature and consequences of his plea was explained to him in Bahasa Malaysia.

[8] Learned Deputy Public Prosecutor then tendered two separate set of facts, one being against the first and second accuseds which was marked as exh. P1 after the facts was read and explained and admitted by both the accuseds and the other

set of facts was against the third accused where it was marked as exh. P2 after the same was read and explained and admitted by the third accused.

[9] The learned deputy also tendered the following documents and items as evidence to support the amended charges where the accuseds had pleaded guilty which were marked as exhibits after the same were shown, explained and admitted by all the three accuseds:

Nos.	Item	Exhibit No:
1.	first information police report Jelapang No: 000681/05 dated 12.3.2005	P 3
2.	Arrest report Bercham No: 001083/05 dated 23.3.2005 against the first accused	P 4
3.	Arrest report Jelapang No: 892/05 dated 29.3.2005 against the second accused	P 5
4.	Arrest report Jelapang No: 000915/05 dated 31.3.2005 against the third accused	P 6
5.	Sketch plan with key (3 pages)	P 7a&b & P 7k
6.	Postmortem report dated 12.3.2005 on Azman Bin Abdul Karim, the deceased	
	Note:-	
	(1) learned Deputy Public Prosecutor informed the court that as against the first and second accuseds, the prosecution will confine to pages 1-3.	P 8A-C as against the first and second accuseds.
	(2) as against the third accused, the entire postmortem report is used and admitted.	P 8A-F as against the third accused.
7.	Death Certificate and the Burial Permit of the deceased.	P 9 & P 9a

8.	35 photographs with negatives and key	P 10(1-35) P 10(1N-35N) P 10K
9.	23 photographs of the postmortem with negatives and key	P 11A - W P 11AN - WN P 11K
10.	1 box sealed Jabatan Kimia Ipoh	P 12
11.	In exhibit P 12 there was 1 gray coloured helmet	P 12
	Note:-	
	The learned Deputy Public Prosecutor informed the court that the helmet will be used against the second accused	P 13
12.	1 large box sealed Jabatan Kimia Ipoh	P 14
13.	In exhibit P 14 there was 1 brick	
	Note:-	
	The learned Deputy Public Prosecutor informed the court that the brick is used against the third accused	P 15
14.	Jelapang police report No: 000687/05	P 16

[10] All the items were shown, explained to the accuseds and the documents were read and upon admission it was all marked as exhibits.

[11] Upon accepting the plea of guilty, all the accuseds were found guilty and convicted as per the amended charge against the first and second accuseds and as per the alternative charge against the third accused.

[12] Learned counsels then submitted their plea of mitigation with the authorities on sentence. Learned Deputy Public Prosecutor also submitted on the sentence.

[13] As this appeal is against sentence by the third accused, it is not necessary to include in this judgment, the submissions of both learned counsels and the Deputy Public Prosecutor on sentence against the first and second accuseds except to state that the first and second accuseds were sentenced on 16 December 2005 to 10 month's imprisonment each from the date of arrest on 23 March 2005 as against the first accused and against the second accused from the date of arrest on 29 March 2005. It is important to state that the maximum sentence provided by law for an offence under s. 323 of the Penal Code is 12 month's imprisonment.

[14] As for the third accused who is the appellant in the instant appeal to the Court of Appeal, learned counsel submitted on sentence and also tendered written submissions and a list of authorities which was marked as encl. 18 and 18A respectively. The mitigation plea submitted on behalf of the third accused is as follows and the third accused will be referred to as "the accused" in this judgment.

(1) The deceased cut across in front of the accused and made a U-turn.

(2) The deceased got out from his car and challenged the accused and a stone was thrown which hit the accused on his face. The accused realised there was blood on his face as a result of the stone which was thrown by the deceased. The accused then picked a brick (exh. P14) and hit the deceased.

(3) The accused regretted his action because he was unable to control his temper and did not realise at that time the consequences of his action.

(4) The accused surrendered himself to the police on 31 March 2005.

(5) The incident was not planned against the deceased as the deceased was not known to the accused.

(6) The accused did not use any violence as compared to the violence used in offences under s. 304(a) of the Penal Code.

(7) The accused is remorseful and wishes to change his life style by starting a business of his own.

(8) Urged upon this court to give a chance to the accused.

(9) A lenient sentence in the region between 8-9 years imprisonment be imposed and relied on the trend of sentences imposed for similar offences under s. 304(a) of the Penal Code.

(10) Urged upon the court to order the sentence of imprisonment to commence from the date of his arrest on 31 March 2005.

(11) The following cases were relied on by the learned counsel and it was submitted that the accused who has pleaded guilty should be treated leniently:

(a) *Melvani v. Public Prosecutor* [1971] 1 MLJ 137

(b) *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134

(c) *Public Prosecutor v. Ravindran & Ors* [1993] 1 MLJ 45

(d) *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1988] 1 MLJ 167

(e) *Public Prosecutor v. Tay Chuan Beng & Anor* [1989] 1 MLJ 403

(f) *PP v. Soo Tai Leng* [2005] 7 CLJ 218

(g) *Public Prosecutor v. Tai You Choy* [1982] CLJ 78; [1982] CLJ (Rep) 687

(h) *Koay Teng Soon & Anor v. Public Prosecutor* [2000] 1 CLJ 677

(i) *Public Prosecutor v. Saiful Afikin bin Mohd Firus* [1996] 3 CLJ 629

[15] On the other hand, the learned Deputy Public Prosecutor submitted as follows:

(1) The degree of culpability against the accused where he caused the death of the deceased must be considered.

(2) In this case, the accused who had left the scene of the incident returned towards the deceased and caused the injuries.

(3) On the facts, there is no reasonable grounds to impose a lenient sentence.

(4) The court has to consider the deterrence and public interest.

(5) Justice is not just for the accused but to the society and the deceased cannot be brought back alive – what happens to the widow and four children of the deceased and the trauma which the deceased family had to experience.

(6) Public interest and safety is paramount, crime of violence as in the instant case is on the increase.

(7) Deterrence sentence is not rehabilitation but to protect the public against such incidence.

(8) Justice system should not tolerate such wanton disregard and breach of law and foremost human life and the court must show its abhorrence.

(9) Urged upon this court to impose the maximum sentence of 20 years.

(10) The learned Deputy Public Prosecutor submitted a list of authorities which contained the following cases:

(1) *Koay Teng Soon & Anor v. Public Prosecutor* [2000] 1 CLJ 677

(2) *Vinaga Moorthy a/l Gopal v. Public Prosecutor* [2003] 1 CLJ 758

(3) *Ralon bin Banas v. Public Prosecutor* [2000] 3 CLJ 310

(4) *Veerian T Latchmanen v. PP* [2001] 7 CLJ 466

(5) *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186

(6) *Tan Bok Yeng v. Public Prosecutor* [1972] 1 MLJ 214

(7) *Public Prosecutor v. Yap Chong Fatt* [1963] 29 MLJ 136

(8) *Public Prosecutor v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370

(9) *Public Prosecutor v. Muhari bin Mohd Jani & Anor* [1999] 8 CLJ 430

A (10) *Mat Omar v. Pendakwa Raya* [1997] 1 LNS 528

(11) *Hashim bin Saud v. Yahaya bin Hashim & Anor* [1977] 2 MLJ 116

B (12) *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1988] 1 MLJ 167

(11) The facts in the instant case have to be considered where the accused who had left the scene had returned towards the accused and caused the injuries.

C (12) A list of previous convictions against the accused was tendered which was read and explained to the accused and upon admission marked as exh. P 20.

D **[16]** In reply, learned counsel for the accused submitted as follows:

(1) Conceded that each case has to be considered on its own set of facts.

E (2) There is no striking grounds advanced by the learned Deputy Public Prosecutor for this court to impose the maximum sentence.

(3) Accused is 22 years old and urged this court to give him a chance as he has pleaded guilty.

F **[17]** At the conclusion of the submissions by learned counsel and Deputy Public Prosecutor, this court posed the following questions:

G (1) Whether there is any independent evidence obtained in the course of police investigation that the deceased had thrown a stone at the accused which hit his face and was bleeding as submitted by learned counsel for the accused.

H **[18]** Learned Deputy Public Prosecutor replied as follows:

(1) there was no such independent evidence. It was only the accused who informed that the deceased had thrown a stone towards his direction and hit his head and not his face. There is also no medical evidence to support the statement of the I accused. The first and second accuseds had informed that the deceased had thrown a stone and hit the helmet of the accused and not his face.

[19] Learned counsel for the accused replied as follows: A

(a) Conceded there is no evidence to support that the stone hit the accused's face and that he was bleeding.

(b) According to the accused, there were two or three other friends besides the other two accuseds and there were also other groups at the scene. There were about ten persons at the place of incident who are not known to the accused. B

[20] Having considered the alternative charge, the facts of the case as presented by the prosecution against the accused, the exhibits which are relevant against the accused, the plea of guilty, the submissions of both learned counsel and the Deputy Public Prosecutor, the accused was sentenced on 16 December 2005 to 14 year's imprisonment from the date of his arrest on 31 March 2005. Hence, this appeal by the accused. C D

[21] In *Mohamed Noor v. Public Prosecutor* [1966] 2 MLJ 173 at p. 174, His Lordship Abdul Aziz J said:

> ... The learned counsel for the appellant has urged me to say that there was some element of provocation in this case and it should reflect on the sentence imposed by the court. On the other hand, the learned Deputy Public Prosecutor has urged me to consider that offences of violence are prevalent in this part of the country and that the heavy sentences imposed by the courts here for offences of this nature have proved a great deterrent as evidenced by the reduction in the number of crimes of violence. E F

[22] In *Public Prosecutor v. Gopalan* [1985] 2 MLJ 230, the accused had pleaded guilty to a charge of culpable homicide not amounting to murder and sentenced to seven years' imprisonment under the second limb of s. 304. However, His Lordship Wan Yahya J (as he then was) said that had the offence been placed under the first limb of s. 304 of the Penal Code, the imposition of 14 year's imprisonment to be expedient with a view to the accused's reformation. G H

[23] In *Public Prosecutor v. Safian bin Abdullah & Anor* [1983] 1 CLJ 324; [1983] CLJ (Rep) 804, the two accused persons aged 20 and 21 years at the time of committing the offence had pleaded guilty to an amended charge to culpable homicide not amounting to murder under s. 304 of the Penal Code. His Lordship Wan Yahya J (as he then was) said: I

> In my opinion these two accused, in spite of their ages, are dangerous young criminals of aggressive propensity. Unless they are properly reformed they will continue to be a serious menace to society. **A sufficiently long period of detention will be required for their correction, reformation and rehabilitation before they can be allowed to return to society.** (emphasis added)
>
> As the sentences of 14 years' imprisonment on both accused persons are deemed to have commenced almost three years ago, from the date of their arrest, they will be required at the most to serve a total period of 11 years' imprisonment. However, with the usual one-third remission for good conduct, they may well be out of prison in less than 8 years – a period of detention reasonably required for their reformation.
>
> I therefore consider the imposition of the custodial sentence on both accused fair and appropriate.

[24] In *Rosli bin Supardi v. Public Prosecutor* [2002] 3 CLJ 544 at p. 551, His Lordship Gopal Sri Ram JCA said:

> ... The sentence imposed does not even attempt to meet the public interest nor does it have any relation to the aggravated circumstances in which the offence was committed. We would be plainly failing in out duty, to our conscience and to the public if we did not interfere in this case. Having regard to the facts and the circumstances of the appellant's case and giving public interest the weight it deserves, we are satisfied that the sentence passed is manifestly inadequate, we would therefore, take these considerations into account and the other circumstances advanced in plea of mitigation before the sessions court, we would set aside the sentence of six years and substitute in place with 12 years' imprisonment from 30 September 1994 (date of arrest). We would also set aside the sentence of three strokes of the rotan and substitute in place with five strokes. The orders of the sessions court are altered to this effect.

[25] In *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256, His Lordship Hashim Yeop A. Sani J (as he then was) said:

> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed ...

[26] In *Chandra Sekaran a/l Ramiyah & Anor v. Public Prosecutor* [2000] 3 CLJ 293, the two appellants who were originally charged with causing the death of the deceased, an offence punishable under s. 302 of the Penal Code read with s. 34 of the Code had pleaded guilty to a reduced charge under s. 304 of the Penal Code (first limb) of the Penal Code. The appellants were sentenced to 12 years' imprisonment each and the sentence to take effect from the date of arrest. The appellants appealed against their sentence. In dismissing the appeal, His Lordship Haidar JCA said:

> We do appreciate that it is the duty of the counsel in mitigating for the accused in respect of sentencing to urge the court to consider the interests of the accused. Though the judge must consider the interests of the accused, he had nevertheless to consider the interests of the public as well. In other words he has 'to strike a balance, as far as possible, between the interests of the public and the interests of the accused' per Hashim Yeop Sani J (as he then was) in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 at p 258B.
>
> The maximum sentence for the offence for which the appellants were convicted is 20 years' imprisonment and in our view the sentence of 12 years' imprisonment to take effect from the date of arrest on each of the appellant is not manifestly excessive. There were no grounds to warrant us to interfere with the sentence.

[27] In *Christopher Khoo Ewe Cheng v. Public Prosecutor* [1998] 3 CLJ 705, the Court of Appeal upheld the sentence of 14 years' imprisonment by the High Court, Ipoh against the appellant who was 24 years old at the time of the offence of culpable homicide not amounting to murder an offence under s. 304(a) of the Penal Code. (see *Public Prosecutor v. Zalamud @ Mohd Rashid bin Mohd Ali Dan Lain-lain* [2003] 6 MLJ 241 at p. 248)

[28] In *Yit Kean Hong v. Public Prosecutor* [2005] 4 CLJ 592, the accused pleaded guilty to an amended charge for culpable homicide not amounting to murder an offence under s. 304 first limb of the Penal Code after the prosecution tendered an amended charge on the second day after four prosecution witnesses had given evidence. The High Court sentenced the accused to 15 years' imprisonment. The accused was dissatisfied with the sentence appealed to the Court of Appeal on the ground that the sentence was manifestly excessive. In dismissing the appeal and upholding the sentence, His Lordship Nik Hashim bin Nik Abdul Rahman JCA (as he then was) said:

A The learned judge, in his judgment, explained fully the reasons why he imposed 15 years imprisonment for each offence and ordered the jail term to run consecutively. In imposing the sentences, the learned judge had taken into consideration the guilty of plea of the appellant and the seriousness of the two crimes as well as the element of public interest. In our view, on the facts B of this case, to impose a concurrent sentence and a sentence of imprisonment of less than 15 years for each of the offences would not be appropriate. The public needs to be protected from such dangerous and violent man like the appellant.

C Whilst it is true that the total period of 30 years imprisonment is long and will have a crushing effect on the appellant bearing in mind his relatively young age, the gruesome fact remains that the appellant had acted cruelly and brutally on the two defenceless victims. Indeed he deserved a deterrent sentence. To our minds, the sentences imposed were commensurate with the offences. D The learned judge had properly exercised his discretion in imposing the sentences and there were no grounds for us to interfere with them. The sentences were not manifestly excessive given the facts of the case, the circumstances of the offences and the background of the appellant. The appeal was therefore E dismissed. The sentences and the order made by the High Court were affirmed.

[29] In *Ahmad bin Haji Bakar v. Public Prosecutor* [1988] 2 MLJ 216 at p. 217, His Lordship Roberts CJ said:

F In *Taib bin Gemok v. Public Prosecutor*, the public interest does require that a sentence of imprisonment, sufficient to deter not only the accused but other persons of a like mind, shall be imposed in cases of this kind.

[30] In *Public Prosecutor v. Jafa bin Daud* [1981] 1 MLJ 315 at G p. 316, His Lordship Mohamed Azmi J (as he then was) said:

A "sentence according to law" means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial H principles.

[31] In *Fan Yew Teng v. Public Prosecutor* [1975] 2 MLJ 235 at p. 238, His Lordship Lee Hun Hoe CJ (Borneo) said:

In any civilised society there must be law and order which are I the prerequisites to the advancement of harmonious living and human happiness.

[32] In *Public Prosecutor v. Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128 at p. 129, His Lordship Raja Azlan Shah J (as His Royal Highness then was) said:

> It is well settled that the sentence must reflect the gravity of the offence. In the present case it is not so much the triviality of the injury but the circumstances culminating in the commission of the offence which are of importance.

[33] Although this court agrees with the learned Deputy Public Prosecutor's submission that public interest and public safety is paramount when compared to the interest of an individual as in the instant case, the accused, who had inflicted the fatal injury on the deceased which caused the death, but however, this court does not agree that the maximum sentence should be imposed against the accused on the facts and circumstances in the instant case. The offence committed by the accused is serious and the degree of seriousness must be reflected on the sentence imposed but at the same time, the court must also have regard to the proportion between the offence, the punishment provided by law, the mitigating plea, and any extenuating circumstances which might exist and to be in favour of the accused. (See *Liow Siow Long v. Public Prosecutor* [1970] 1 MLJ 40 at p. 42). On the other hand, the maximum term of sentence as urged upon by the learned Deputy Public Prosecutor must be limited by reference to the circumstances of the offence itself. Maximum penalty is intended for cases falling within the worst category of cases for which the penalty is presented. (See *Veen v. The Queen (No. 2)* [1988] 164 CLR 465 at p. 478, *Gilson v. The Queen* [1991] 172 CLR 353 at p. 364).

[34] This court is of the respectful view that the age factor that the accused is young and should be spared a custodial or be given a lenient sentence should no longer be used as of right to influence or as a decisive consideration in all cases where the accused has pleaded guilty as each case must be considered on its own set of facts and the nature of the crime committed and any aggravating circumstances. The age factor that the accused is young is taken as a decisive consideration in the assessment of sentence may perhaps have to give way to safeguard public interest and safety of life and property. The present state of affairs involving young offenders to committing crime using violence is alarming and in some cases appears to be disproportionate to the provocation received which had triggered instant retaliation by

using violence and which has resulted in death. It is of course for the good to repent but it is too late after the fatal incident as the grief and suffering by the deceased's family cannot be described in language than to imagine that it must be a very painful and unbearable feeling and experience as the life has been taken away by unlawful means by the accused for which the accused must be prepared to accept the punishment provided by law subject to the consideration of the facts and the mitigating circumstances.

[35] In the instant case, the anger if there was any on the accused as raised by the learned counsel should have subsided when the accused left the scene but instead he returned to the scene as probably he could no longer control his temper and moved forward towards the deceased and inflicted the fatal injury by hitting the deceased with a brick stone (exh. P14) as admitted by him and as can be seen in the photographs (exh. P10) and the postmortem report (exh. P8) and that injury inflicted by the accused had caused the death of the deceased. It is generally recognised that it is the essence of provocation that the acts of others or the victims cause offenders to lose their self control and retaliate and committed offence but it is necessary to balance the degree and nature of the provocation against the acts of violence committed by the accused. In the instant case, the accused had the opportunity for a cooling period when he left the scene but however he returned and caused the fatal injury to the deceased.

[36] Nevertheless, this court has considered the mitigation plea on behalf of the accused and that it should not be brushed aside and also the fact of co-operation and assistance given to the police to wrap up or complete the investigation so soon and eventually the plea of guilty. (See *Raja Izzuddin Shah v. Public Prosecutor* [1979] 1 MLJ 270, *Public Prosecutor v. Doraigunaraju a/l Krishnan* [1993] 3 CLJ 664, *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441 at p. 448). However, the manner and circumstances in which the accused had committed the offence on the deceased and on a public road was grave where motorists expect to drive safely not only of road accidents but free of crime. Street brawls is the very type of offence which demands for severe deterrent sentence.

[37] *R v. Henry* [1999] 46 NSWLR 346: 106 A Crim R 149 per Spigelman CJ at [87]-[88].

The prevalence of an offence is a relevant factor that may be taken into account by the sentencing judge so that the sentence will reflect both the seriousness of the offence and its prevalence: *R v. Cuthbert* [1967] 86 WN (Pt 1) NSW 272 per Herron CJ at 278:

[38] In *Public Prosecutor v. Mustapha bin Abdullah* [1996] 3 CLJ 458 at p. 461 and 462, His Lordship KC Vohrah J (as he then was) said:

Courts can take judicial notice that cases of aggression on our roads, most of the times over trivial matters, have become far too frequent. Defenceless victims – in addition to being terrorized – are brutally punched, kicked, knocked about or attacked with lethal instruments by bullies. The present state of affairs calls for strong and firm handling by our courts of these bullies so that clear signals are sent out that the dangerous and obnoxious behaviour of bullies will be met with the severest of penalties.

There is hardly a week that passes by without reports of violent attacks by aggressive road users on other road users. A stop must be put to these attacks. And that can only be done by our courts if exemplary sentences are meted out to deter such brutish behaviour.

[39] In *Ong Hwee Leong v. Public Prosecutor* [1992] 1 SLR 794, His Lordship Yong Pung How CJ said at p. 795:

Although the appellant declined to say anything in mitigation, the district judge took into account the fact that he was a first offender. He could not ignore the fact, however, that the appellant had assaulted a man twice as old as himself on the face and had simply driven off after that, and he was of the view that *the appellant's action was one of hooliganism on the road. He noted that motorists had increasingly resorted to violence at the slightest irritation or provocation and there had recently been a spate of such cases. In his view such deliberate violence on the road must be deterred.* (emphasis added)

Lord Lane CJ's observations in *R v. Hassan; R v. Schuller*, he said:

Resorting to violence over trivial traffic matters has been an unpleasant feature on our roads. Such conduct cannot be condoned and the trial judge cannot be faulted for having taken the view that a prison term was called for in order to prevent the accused and other like-minded motorists from committing such offences. I am therefore unable to accede to counsel's plea that only a fine be imposed. (emphasis added)

> *This matter arose from what was certainly a trivial dispute. Such minor incidents occur on our roads many times every day. No doubt they are frustrating to those involved. But if, many times every day on our public roads, everyone were to lose his temper and react to the degree the appellant did, all semblance of order would quickly dissipate and only the most violent would prevail. The perceptible trend in this direction deservedly incurs the courts' displeasure and must be determinedly discouraged. Drivers must refrain from alighting from their vehicles and assaulting others simply because those others have annoyed them by their driving or in some other way.* I therefore adopt unreservedly Lord Land CJ's view in Hassan & Schuller that prison sentences ought to follow this sort of incident. Further, this particular display of violence was deliberate and out of all proportion to the irritation, and the incident was in any case started by the appellant himself. One week's imprisonment clearly could not in the circumstances be manifestly excessive. I therefore dismissed the appeal. (emphasis added)

[40] In *Tan Bok Yeng v. Public Prosecutor* [1972] 1 MLJ 214 at p. 215, His Lordship Sharma J said:

> The second accused was 20 years of age while the appellant was 25 years at the date of the commission of the crime. I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. *There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met.* It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society. (emphasis added)

[41] Loss of human lives cannot be compensated by the length of imprisonment and any punishment imposed against the accused cannot also comfort the family of the deceased nor would it cure their anguish. (See *R v. Shepard, R v. Vernet* [1994] 2 All ER 242 at p. 245). On the other hand, there is no warrant for the court to take into account the wishes of the victim or victim's family to determine the appropriate sentence as if that is allowed it will tantamount to acceding the wishes of the gallery and that has to be disregarded. Nevertheless, some objective assessment of the

effect upon the victim or victim's family may be taken into account without paying heed to the wishes of the victim or the victim's family that a punishment of the utmost severity be imposed. (See *Bollen (Mark Andrew)* [1998] 99 A Crim. R 510 and *R v. Mansour* [1999] 29 MVR 409). This court is of the view that it is entirely appropriate for this court to take into consideration the impact of crime on the family of the deceased, and to give public recognition of the grief and suffering imposed. (See *R v. Mansour* [1999] 29 MVR 409).

[42] The requirement of mercy and leniency to be shown to an individual offender depends on multiplicity of facts, facts of the case, circumstances, the mitigating plea, the offender's favourable subjective circumstances which triggered the retaliation, degree and nature of provocation and any extenuating circumstances under which the offence was committed and all these factors must be balanced with public interest which is paramount. (See *Valentinzi* [1980] 2 A Crim. R 170 at p. 174). Although judicial discretion must be exercised in accordance with established sentencing principles but it may vary from case to case depending on the nature and type of offence and the offender. In *Veen v. The Queen (No. 2)* [1988] 164 CLR 465, Mason CJ Brennan, Dawson and Toohey JJ observed:

> [S]entencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

[43] Trend of sentences passed against other offenders having committed similar offences by other courts of co-ordinate jurisdiction and relied on by learned counsel for the accused is not absolutely binding and may by itself be of limited weight. The trend of sentence should not lay down a requirement of anything in the nature of rule and they are not rules of universal application although it may allow for the public interest in the perception of consistencies in sentencing to be served but not intended to establish a regime guided by mathematical precision.

[44] In considering the appropriate sentences, courts have also considered the three fold purposes, retribution, deterrence and reformation.

[45] Retribution And Denunciation

In *Treloar* [1989] 43 A Crim R 75, Crockett J, in the Supreme Court of Victoria, spoke about balancing the elements of retribution and rehabilitation (at 78):

> [I]t is one thing to denigrate what may be described as a public clamour for retribution. It is another altogether to say that, if the punitive element which the nature and seriousness of the crime demand should be given effect to in the selection of an appropriate penalty, that element is to be disregarded simply because in so giving effect to it may inhibit the possibility of the prisoner's rehabilitation. The court, in sentencing any prisoner, has an obligation to have regard to the public's expectation of what an appropriate punitive period of imprisonment should be having regard to all the relevant circumstances.

[46] Discretion To Be Exercised Judicially

As a general rule, maximum penalties for particular offences are set out in legislation and it is left to the sentencing judge or magistrate to consider the facts of each case and determine what sentence (if any) should be imposed in the particular circumstances of the case. However, although the process of sentencing involves an exercise of discretionary judgment, that discretion must be exercised judicially. This then both limits and guides the exercise of the discretion. As Street CJ pointed in *R v. Rushby* [1977] 1 NSWLR 594 at 597:

> The judicial discretion underlying the formulation of a sentence must be exercised with due regard to principles of law deducible from authoritative decisions. The philosophy of the Common Law requires adherence to established doctrines and principles that have over years, and in multiple instances, been found to be best calculated to serve the ends of justice. The adjudicative process, if it is to be consistent and ordered, must observe and apply these doctrines and principles and thus must necessarily be attended by a requisite disengagement and detachment. It is cool reason, not passion or generosity, that must characterize sentencing, as all other acts of judgment. Although the discretion left to the judge is wide, the doctrines and principles established by the Common Law in

regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges.

This generally means that the sentencer should:

(1) be aware of the penalty prescribed by statute for the particular offence (or offences) under consideration;

(2) take into account such other relevant statutory or common law sentencing options as are available and that potentially could be more appropriate than the type or quantum of penalty prescribed for the offence;

(3) pay due regard to relevant principles of sentencing which have been enunciated by the higher courts in prior decisions; and,

(4) take into account both the type and quantum of sentences imposed in prior cases of a similar kind.

[47] This court wished to make it clear by the sentence which it has imposed that acts of violence by offenders on a slightest provocation to the extent which has resulted in death will not be tolerated in our society and such criminal acts of violence will result in appropriately severe sentence to deter attacks in public streets especially in the wee hours. The function of the criminal law and purpose of punishment cannot be found in any single explanation, for it depends both upon the nature and type of offence and the offender but all purposes may be reduced under the single heading of the protection of society, the protection of the community from the crime. (See *R v. Cuthbert* [1967] 86 WN (Pt 1) (NSW) 272 per Herron CJ at p. 274). However, a plea of guilty is always a matter for the court to take into account when imposing sentence and significant reference should explicitly be made to that consideration in the sentencing process. (See *MA (Thanh)* [1999] 107 A Crim. R 252). As such the sentence of 14 years' imprisonment is most appropriate on the facts and circumstances in the instant case. Accordingly, the accused was sentenced to 14 years' imprisonment from the date of arrest on 31 March 2005.